the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-834

...ND McCLANAHAN, ON BEHALF OF HERSELF AND ... OTHERS SIMILARLY SITUATED, APPELLANTS

v.

ARIZONA STATE TAX COMMISSION

...Y APPEAL FROM THE SUPREME COURT OF ARIZONA

...ANDUM FOR THE UNITED STATES AS AMICUS CURIAE

... memorandum is submitted in response to the ...t's order of February 22, 1972, inviting the Solic... General to express the views of the United States ... case.

... petitioner is an enrolled member of the Navajo ... of Indians. At all pertinent times she resided ... the portion of the Navajo Indian Reservation ... in the State of Arizona. Her income was "de... from sources within the confines of the Navajo ... Reservation." J.S. App. B p. 3a. The question ...ed is whether the State of Arizona has juris... to tax such income.

... has generally been accepted that, in the ab... of congressional authorization, the States have

no right to tax Indian property or income within a reservation.' However, as recent programs for Indian economic development have begun to take effect, some States have asserted jurisdiction to tax such property and income. See, generally, our brief in *Mescalero Apache Tribe*, v. *Jones*, No. 71–738, certiorari granted, April 24, 1972. See also *Tonasket* v. *State of Washington*, No. 71–1031. The question whether or under what circumstances a State may tax income earned within a reservation by Indians who live on the reservation therefore warrants the attention of this Court.

2. In *Worcester* v. *Georgia*, 6 Pet. 515, this Court held broadly that the laws of Georgia could have no force within the Cherokee reservation located in that State. The Court stated that "[t]he whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States." *Id.* at 561.

'U.S. Department of the Interior, *Federal Indian Law* (Cohen, 1958 rev.) 845–846:

> * * * State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply. It follows that Indians and Indian property on an Indian Reservation are not subject to State taxation except by virtue of express authority conferred upon the State by act of Congress. Conversely Indian property outside of an Indian reservation is subject to State taxation unless congressional authority for a claim of tax exemption can be found. * * * [citing *Surplus Trading Co.* v. *Cook*, 281 U.S. 647, 651]. This is in contrast to federal taxation in which jurisdiction is clear and tax coverage is assumed unless there is a particular exemption in a treaty or statute. See *Squire* v. *Capoeman*, 351 U.S. 1.

Decisions subsequent to *Worcester* have established that a State may have jurisdiction over exclusively non-Indian activities occurring on a reservation. *United States* v. *McBratney*, 104 U.S. 621 (service of process on non-Indian living within reservation); *Draper* v. *United States*, 164 U.S. 240 (murder on reservation of one non-Indian by another non-Indian); *Utah and Northern Railway* v. *Fisher*, 116 U.S. [illegible] (state taxation of portion of railroad running through reservation on land ceded to the railroad). Additionally, Congress has provided a method for States to assume extensive jurisdiction within a reservation. See discussion of Public Law 280, Act of August 15, 1953, 67 Stat. 588, 18 U.S.C. 1162, and 28 U.S.C. 1360, *infra*. However, subject to narrow exceptions, and in the absence of legislation granting jurisdiction to the States, the general inapplicability of state law within a reservation remains. *Williams* v. *Lee*, 358 U.S. 217, 219.[2]

Moreover, as this Court pointed out in *Williams*, "Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." 358 U.S. at 220. When Congress has wished to permit the States to exercise jurisdiction within Indian reservations, it

[2] *Organized Village of Kake* v. *Egan*, 369 U.S. 60, while recognizing the rights of States to exercise jurisdiction over Indians, held only that non-reservation Indians living in Indian villages are bound by the State's conservation laws. Compare *Metlakatla Indians* v. *Egan*, 369 U.S. 45, a companion case to *Kake*, in which the Secretary of the Interior's exclusive authority over fishing within the Metlakatla reservation was upheld. Alaska, the State involved in both cases, has assumed jurisdiction within reservations under P.L. 280, *supra*.

has done so by particular statutes. See *Kennerly* v. *District Court of Montana*, 400 U.S. 423. For example, Congress granted certain States plenary jurisdiction over specified tribes by "termination" legislation enacted in the 1950's.[1] And Public Law 280, *supra*, provided a method by which any State which took specific steps to do so could bring Indian tribes within the jurisdiction of its criminal and civil courts. Under Public Law 280, as originally enacted, the States could assume such jurisdiction without the consent of the tribes affected. More recent legislation, however, has amended P.L. 280, in the interest of Indian self-government, to require the consent of the tribe before a State can assume jurisdiction and to permit retrocession of state jurisdiction acquired under the earlier law. Act of April 11, 1968, 82 Stat. 78, 25 U.S.C. 1321, *et seq.*

Similarly, when Congress has wished to extend to the States the right to tax Indians within a reservation it has done so by carefully delimited legislation. Thus 25 U.S.C. 398 specifically authorizes the States to tax mineral production on unallotted tribal land. And 4 U.S.C. 105–109 (the Buck Act), which permits the States to tax persons "residing within a federal area or receiving income from transactions occurring

[1] Klamath Tribe, 25 U.S.C. 564–564x; "mixed blood" Ute Indians, 25 U.S.C. 677–677aa; "Western Oregon" Indians, 25 U.S.C. 691–708; Alabama and Coushatta Indians of Texas, 25 U.S.C. 721–728; Paiute Indians of Utah, 25 U.S.C. 741–760; Wyandotte Tribe of Oklahoma, 25 U.S.C. 791–807; Peoria Tribe of Oklahoma, 2 U.S.C. 821–826; Ottawa Tribe of Oklahoma, 25 U.S.C. 841–853; Menominee Tribe of Wisconsin, 25 U.S.C. 891–902; Ponca Tribe of Nebraska, 25 U.S.C. 971–980; California rancherias, 72 Stat. 619, amended by 78 Stat. 390.

or services performed in such area" (4 U.S.C. 105, 106), specifically exempts Indians from the operation of the Act. 4 U.S.C. 109. See also *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685, 691.

Since Congress has passed no law authorizing state taxation of income earned by Indians within the Reservation involved in the present case, the decision below, upholding the authority of the State to impose such a tax, seems incorrect on this ground alone.

2. In any event, the decision below is inconsistent with the particular legal relationship that exists between the State of Arizona and the Navajo Indians. When Arizona was admitted to the Union it agreed that it does "forever disclaim all right and title to [Indian lands and] * * * the same shall * * * remain * * * under the absolute jurisdiction and control of the Congress of the United States * * *." Act of June 20, 1910, 36 Stat. 557, 569. See also *Warren Trading Post, supra*, 380 U.S. at 687. When Congress authorized States which were denied jurisdiction by their enabling Acts to assume civil and criminal jurisdiction over Indian Reservations within their boundaries, Arizona did not choose to do so. See *Williams, supra*, 358 U.S. at 222–223.[4] As this Court noted in *Williams*,

[4] In 1967, after Williams and before the amendment to P.L. 280, requiring Indian consent for an assumption of jurisdiction by a State, Arizona enacted two statutes asserting jurisdiction over "Indian tribal lands, reservations and allotments" for the enforcement of air and water pollution legislation. Laws of 1967, Ch. 2, Sec. 10, 36 Ariz. R.S. § 1801; Laws of 1967, Ch. 106, Sec. 2, 36 Ariz. R.S. § 1865. These limited statutes obviously are far less than a full assumption of civil and criminal jurisdiction under P.L. 280.

Arizona's reason for failing to accept jurisdiction is "possibly because the people of the State anticipate that the burdens accompanying such power might be considerable." *Id.* at 228. Where a State has not accepted such responsibility, we submit, it cannot, in the absence of specific congressional authorization, tax income earned within the reservation by Indian residents of the reservation.[1]

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Erwin N. Griswold,
Solicitor General.

Kent Frizzell,
Assistant Attorney General.

Harry R. Sachse,
Assistant to the Solicitor General.

Edmund B. Clark,
Carl Strass,
Attorneys.

April 1972.

---

[1] We express no opinion in this brief on whether a State which obtains jurisdiction under P.L. 280 thereby obtains a right to tax within a reservation. See *Tonasket* v. *State of Washington*, *supra*.

U.S. GOVERNMENT PRINTING OFFICE: 1972